BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

TED R. BYRUM		
Claimant	)	
VS.	)	
	)	Docket No. 1,052,356
KINDSVATER, INC.	)	
Respondent	)	
AND	)	
	)	
KANSAS TRUCKERS	)	
RISK MANAGEMENT GROUP	)	
Insurance Carrier	)	

ORDER

Respondent and its insurance carrier (respondent) appealed the March 14, 2011, preliminary hearing Order for Medical Treatment entered by Administrative Law Judge (ALJ) Pamela J. Fuller.

ISSUES

1. Does the Board have jurisdiction to review the preliminary hearing findings that claimant's injury arose out of and in the course of his employment and that claimant gave timely notice of the accident? Claimant asserts that respondent has never denied claimant sustained an accidental injury on July 12, 2009, and that respondent is merely contesting the nature and extent of claimant's injuries. Claimant contends the Board is without jurisdiction to hear respondent's appeal because it is undisputed that claimant's injury arose out of and in the course of claimant's employment and undisputed that claimant gave respondent timely notice of the accident.

Respondent appeals from the ALJ's finding that claimant suffered a personal injury to his neck and back that arose out of and in the course of his employment. Claimant alleges that on July 12, 2009, he injured his right shoulder, neck and back while working. Respondent acknowledges claimant's right shoulder injury arose out of and in the course of his employment. However, respondent denies claimant's neck and back injuries are work related. Respondent also challenges claimant's credibility and veracity.

Respondent asks the Board to review the ALJ's finding that claimant gave timely notice of the accident. Claimant alleges he gave notice of the accident to respondent on the day claimant was injured. Despite the fact that respondent provided claimant with medical treatment for his right shoulder, including surgery, and made claimant an offer to settle the right shoulder injury claim, respondent is denying claimant gave timely notice of the accident.

2. Should claimant's deposition of February 4, 2011, have been made part of the record and considered by the ALJ? Claimant asserts the February 4, 2011, deposition of claimant should have been made part of the record and considered by the ALJ. At the preliminary hearing, claimant's counsel requested claimant's deposition of February 4, 2011, be made part of the record, but the ALJ denied this request. In his brief, claimant's counsel contends claimant's deposition was an evidentiary deposition and, therefore, should be part of the record. Respondent's counsel does not address this issue in either his brief or reply brief, but at the preliminary hearing stated there was never any intention to have the deposition as an evidentiary deposition.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the record compiled to date and considering the parties' arguments, the undersigned Board Member finds and concludes:

Claimant was a truck driver for respondent in Dodge City, Kansas, and is now 77 years old. On July 12, 2009, claimant was preparing to take a load to Houston. Claimant was cranking up a dolly with his right arm to secure the trailer to the truck he was driving when, in his words, ". . . it spun backwards and jerked my arm and then pushed me and throwed me on the ground."[1] Claimant then drove to respondent's office, which was across the street from where the truck had been and informed Ben Kennedy, a dispatcher for the respondent, he had suffered an injury. Claimant indicated that he told Mr. Kennedy, "'I think I wrenched my back.'"[2] Claimant also told Mr. Kennedy that he hurt his shoulder.

Claimant then proceeded in his truck to Houston, but on the trip his shoulder, back and neck were hurting. His shoulder hurt the worst and he drove with his left hand. A few days later claimant returned to Dodge City. Claimant thinks when he returned from Houston he asked Ben Kennedy if he should turn in the accident and Mr. Kennedy told claimant to ask Justine.[3] Claimant testified he did that and that Justine Carlson said, "'We

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[1] P.H. Trans. at 5.

[2] *Id.*, at 6.

[3] Justine Carlson, office manager for respondent.

better turn it in.'"[4] According to Ms. Carlson, on August 10, 2009, claimant partially completed an Employer's Report of Accident, describing the incident on July 12, 2009. The partially completed Employer's Report of Accident sheds little light on the issue of notice, as it is undated and unsigned. On the report, claimant indicated, "It pulled my right shoulder too hard[.] I think it pulled something to[o] hard[.]"[5]

Ben Kennedy indicated that claimant did not tell him about the accident or sustaining shoulder, neck or back injuries on July 12, 2009, and on that date Mr. Kennedy did not observe claimant in any pain. Mr. Kennedy also indicated that when claimant returned from Houston, claimant did not tell him he sustained shoulder, neck or back injuries. After claimant returned from Houston, Mr. Kennedy never observed claimant in any pain.

Justine Carlson, respondent's office manager, indicated the first time she learned claimant was claiming he suffered an injury was on August 10, 2009, which appears to be the date claimant partially completed the Employer's Report of Accident. Ms. Carlson indicated that on August 10, 2009, claimant did not inform her that he injured his neck and back. Claimant continued to work for respondent as a truck driver until August 28, 2009, when his employment with respondent ended because he could no longer operate a truck with a manual transmission.

Dwayne Davis, a claims adjustor for Alternative Risk Services, testified that he received the claim from the respondent on August 10, 2009. The claim was for a right shoulder injury. Alternative Risk Services handles workers compensation claims for respondent's insurance carrier. Mr. Davis authorized Dr. Alexander Neel, an orthopedic surgeon, to treat claimant's right shoulder injury. It appears claimant was first seen in Dr. Neel's office on August 18, 2009, and soon after was diagnosed with a severe right rotator cuff tear.

On September 4, 2009, claimant underwent right shoulder surgery by Dr. Neel. Dr. Neel indicated claimant had a "massive rotator cuff tear"[6] and a complete repair was not possible due to the extent of the tear and the quality of claimant's rotator cuff tendons. Dr. Neel also performed a distal clavicle, or Mumford, procedure. In an April 29, 2010, report Dr. Neel indicated claimant had currently reached maximum medical improvement and the

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[4] P.H. Trans. at 12.

[5] *Id.*, Resp. Ex. 3.

[6] *Id.*, Resp. Ex. 6.

doctor gave claimant a permanent right upper extremity functional impairment rating of 15% pursuant to the AMA *Guides*.[7]

Claimant asserts that he informed Dr. Neel his neck and back were hurting, but Dr. Neel said "'I only work on shoulders. I can't help you on your back.'"[8] Brandon Hendrix, a physician's assistant for Dr. Neel, indicated in a medical report dated August 18, 2009, "Internal rotation to his lower lumbar region but once again with increased pain." The same medical report states "PAIN ALL OVER" and "PAIN RUNS DOWN ARM TO HAND AND GOES UP TO NECK."[9] According to claimant these statements contained in the medical report are evidence that claimant reported to Dr. Neel that claimant injured his lower back and neck on July 12, 2009.

At the preliminary hearing, respondent introduced as exhibits medical records of claimant from the time claimant was first seen in Dr. Neel's office on August 18, 2009, through February 18, 2011, when claimant was seen by Dr. Rex L. Mann. Claimant was seen by Dr. Mann, a primary care physician, in November 2010 and February 2011. Dr. Mann's records do not indicate claimant complained of any neck or back problems. Claimant asserts after his right shoulder surgery he told the physical therapist about his neck and back complaints, but the physical therapist indicated the neck was probably hurting due to the shoulder injury.

Records of Community Clinic of Beaver (Community Clinic) were introduced by respondent at the preliminary hearing. An August 31, 2010, record indicates claimant complained that his ribs and back had been hurting for one week and that at times he was having trouble breathing. No x-rays or other diagnostic tests were conducted on claimant's neck or back, but a radiology report from an x-ray of claimant's ribs indicated claimant did not have broken ribs. On April 9, 2010, claimant indicated to a health care worker at Community Clinic that he fell on his right arm/shoulder, but again there was no indication claimant complained about neck or back symptoms.

Based upon Dr. Neel's impairment rating, Dwayne Davis wrote claimant a letter on May 11, 2010, making claimant an offer to settle the claim. Mr. Davis indicated claimant called him on September 1, 2010, and claimant indicated he was having some issues with his back. Mr. Davis testified this is the first time claimant advised him that something other than his right shoulder was a part of his workers compensation claim. Mr. Davis told claimant that he would review the medical documentation to see if there was any mention of a back injury.

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[7] American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

[8] P.H. Trans. at 8.

[9] *Id.*, Cl. Ex. 3.

Claimant filed an Application for Hearing on September 2, 2010, alleging right shoulder and back injuries. An amended Application for Hearing was filed by claimant on February 8, 2011, indicating claimant also injured his neck.

On September 7, 2010, at the request of his attorney claimant underwent a medical examination by Dr. Pedro A. Murati, a physical medicine and rehabilitation specialist. Claimant reported stiffness in his neck, pain in his right shoulder and pain in his lower back going down into his left leg to Dr. Murati. Dr. Murati's report indicates there were no radiological films available for review, and he did not provide an impairment rating. Dr. Murati indicated claimant had low back pain with signs and symptoms of radiculopathy; neck pain with signs and symptoms of radiculopathy; right rotator cuff sprain; myofascial pain syndrome affecting the bilateral shoulder girdles, extending into the cervical and thoracic paraspinals; left sacroiliac joint dysfunction and a partial rotator cuff repair, decompression and Mumford procedure.

Dr. Murati made a number of recommendations, which included an MRI of the cervical spine and a bilateral upper extremity NCS/EMG to include the cervical paraspinals. He further recommended claimant undergo an MRI of the lumbar spine and a bilateral lower extremity NCS/EMG to include the lumbar paraspinals. The doctor also recommended physical therapy, injections and several medications. Dr. Murati indicated that within reasonable medical probability, claimant's right shoulder, neck and back injuries were a result of the July 12, 2009, accident.

Further muddying the waters is the fact that in 2008 claimant saw a chiropractor, Dr. Mark Pick, for back problems. At the preliminary hearing, respondent introduced the records of Dr. Pick, whom it appears claimant began seeing on January 11, 2008. According to the records, from January 11, 2008, through May 22, 2008, claimant saw Dr. Pick eight times for complaints of lower back pain, upper back pain and/or right leg pain.[10] Claimant indicated that since he last saw Dr. Pick until the accident on July 12, 2009, claimant did not have any back problems.

Claimant also saw family physician Dr. Russell Fitzgerald on May 27, 2008, just a few days after claimant saw Dr. Pick, and back complaints were noted on that date. It appears a lumbosacral spine MRI was then performed and that on June 20, 2008, Dr. Fitzgerald diagnosed claimant with spinal canal stenosis.[11]

At respondent's request, in January 2011 claimant underwent a medical evaluation by Dr. E. Jerome Hanson, a Diplomate of the American Board of Neurological Surgery. Dr. Hanson noted that in a pain drawing, claimant indicated pain involving the cervical

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[10] *Id.*, Resp. Ex. 4.

[11] *Id.*, Resp. Ex. 8.

thoracic junction and right shoulder, as well as the lower lumbar area extending into the left buttock and posterior thigh. Dr. Hanson opined with regard to claimant's cervical and lumbar spine symptoms:

> In terms of his cervical spine and lumbar spine, his symptoms and findings on examination are most consistent with osteoarthritis and spondylosis secondary to degeneration of the cervical and lumbar spine consistent with his age. This pathology is not related to nor was it an outgrowth or an aggravation of the work-related incident of July 12, 2009 and consequently is not ratable as a work-related injury. Between January 11, 2008 and May 22, 2008 he received treatment to his axial spine, preceding his injury on July 12, 2009. Thus his complaints regarding his cervical and lumbar spine are not related to the work incident.[12]

Respondent denied medical treatment for claimant's neck and back, and a preliminary hearing ensued. The ALJ issued an Order for Medical Treatment on March 14, 2011, ordering respondent to provide medical treatment for claimant's low back and cervical area. Respondent was to furnish the names of three physicians from which claimant was to select a treating physician. The ALJ specifically determined claimant gave notice within 10 days of the accident. By ordering medical treatment for claimant's low back and cervical area, the ALJ implied claimant's neck and back injuries arose out of and in the course of his employment.

The cover page of claimant's deposition indicates it is a discovery deposition. The deposition transcript of Dwayne Davis indicates it is an evidentiary deposition, while the deposition transcript of Ben Kennedy does not state whether his deposition was an evidentiary or a discovery deposition.

At the preliminary hearing respondent requested the depositions of Mr. Kennedy and Mr. Davis be made part of the record, and the ALJ agreed. Claimant asked the ALJ to make claimant's deposition part of the record and respondent's attorney stated there was never any intention to have the deposition as an evidentiary deposition. Claimant's counsel then asserted that respondent's notice to take claimant's deposition was silent on the type of deposition to be taken and he thought it was an evidentiary deposition. The ALJ indicated claimant's deposition was entitled "Discovery Deposition" and that claimant's preliminary hearing testimony was as good as, if not better than, the claimant's deposition. Accordingly, the ALJ found claimant's deposition would not be made part of the record.

The parties do not dispute that claimant injured his right shoulder in an accident while working for respondent on July 12, 2009. The dispute is whether claimant suffered a neck and/or lower back injury on July 12, 2009, and whether claimant gave notice of the accident within 10 days after July 12, 2009.

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[12] *Id.*, Resp. Ex. 7.

Whether the Board has jurisdiction to review the preliminary hearing findings

The Board's jurisdiction to review preliminary hearing findings is statutorily created by K.S.A. 44-534a. The statute provides the Board may review those preliminary findings pertaining to the following: (1) whether the employee suffered an accidental injury; (2) whether the injury arose out of and in the course of the employee's employment; (3) whether notice was given or claim timely made; and (4) whether certain defenses apply. K.S.A. 2010 Supp. 44-551 gives the Board jurisdiction to review preliminary hearing findings if it is alleged the administrative law judge exceeded his or her jurisdiction.

Claimant asserts the Board does not have jurisdiction to hear this appeal, because: (1) it is undisputed that claimant met with personal injury by accident arising out of and in the course of his employment and (2) it is undisputed claimant gave timely notice of the July 12, 2009, accident. Respondent clearly disputes that claimant's neck and back injuries arose out of and in the course of his employment and that claimant gave timely notice of the accident, and respondent's counsel lists these as issues in his brief. Respondent took the testimony of Mr. Kennedy, Mr. Davis and Ms. Carlson in an effort to rebut claimant's contention that he gave timely notice of the accident.

In order to determine if claimant is entitled to medical treatment for his neck and back, the issues of whether claimant's neck and back injuries arose out of and in the course of his employment and whether claimant gave timely notice of the accident must be addressed. The Board has issued numerous orders in the past finding that it has jurisdiction in claims where the claimant's need for medical treatment was caused by accidental injury. In *Glyn*,[13] a Board Member stated:

> But in this instance, the issue raised was whether claimant's current condition and need for medical treatment was caused by the work-related accidental injury. The undersigned Board Member concludes the Board does have jurisdiction to review the preliminary hearing issue of whether an injured worker's symptoms stem from the work-related accident as that issue is, in essence, tantamount to whether a worker has sustained an injury that arises out of and in the course of employment.

This Board Member finds that K.S.A. 44-534a confers upon the Board jurisdiction to review preliminary hearing issues of whether claimant met with personal injury by accident arising out of and in the course of his employment and timely notice.

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[13] *Glyn v. JE Dunn Construction Co.*, No. 1,051,284, 2011 WL 1330708 (Kan. WCAB Mar. 31, 2011).

Should claimant's deposition of February 4, 2011, have been made part of the record and considered by the ALJ?

The Board's jurisdiction to review preliminary hearing orders originates from two statutes. The first, K.S.A. 44-534a, provides the Board has the authority to review certain preliminary hearing findings; namely, (1) whether the worker sustained an accidental injury; (2) whether the injury arose out of and in the course of employment; (3) whether there was timely notice and timely written claim; and (4) any other findings going to the compensability of the claim.[14] The second statute, K.S.A. 2010 Supp. 44-551, grants the Board jurisdiction to review preliminary hearing orders when the Judge has exceeded his or her jurisdiction or authority.

> If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing.[15]

The Board does not have jurisdiction over every issue that arises in a preliminary hearing. The ALJ's decision not to consider claimant's February 4, 2011, deposition part of the evidence is a procedural ruling concerning the admissibility of evidence. An ALJ routinely makes rulings as to whether or not evidence is admissible. Neither K.S.A. 44-534a nor K.S.A. 2010 Supp. 44-551 give the Board jurisdiction to review each and every one of the ALJ's rulings concerning the admissibility of evidence.

K.S.A. 2010 Supp. 44-551 gives the Board jurisdiction to review preliminary hearing orders when the ALJ exceeds his or her jurisdiction. Claimant's counsel asserted in his brief that claimant's deposition should be included as evidence, but did not allege the ALJ exceeded her jurisdiction by failing to do so. Therefore, this Board Member finds the Board has no jurisdiction to review the ALJ's decision concerning the admissibility of claimant's deposition.

Whether claimant suffered a personal injury to his neck and back by accident that arose out of and in the course of his employment

K.S.A. 2009 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation by proving the various conditions on which the claimant's right depends."

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[14] K.S.A. 44-534a(a)(2).

[15] K.S.A. 2010 Supp. 44-551(i)(2)(A).

K.S.A. 2009 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

The burden of proof is upon the claimant to establish his right to an award for compensation by proving all the various conditions on which his right to a recovery depends. This must be established by a preponderance of the credible evidence.[16] Simply put, claimant has the burden of proving he met with personal injury by accident arising out of and in the course of his employment and that he gave timely notice of the accident.

The ALJ ordered respondent to provide medical treatment to claimant's low back and cervical area, thus making an implied finding that claimant suffered low back and cervical injuries that arose out of and in the course of his employment. The ALJ gave no explanation or rationale for her finding.

Respondent contends that if claimant has a neck and/or back injury, neither injury arose out of and in the course of claimant's employment. Dr. Hanson believed the records from Dr. Neel, Mr. Hendrix and the physical therapist indicated that none of those medical providers reported that claimant had any "symptoms referable to neck, lower back or left leg pain."[17] If one looks closely at the August 18, 2009, report of Mr. Hendrix, the statement: "Internal rotation to his lower lumbar region but once again with increased pain,"[18] when read in the context of the entire report, appears to be a statement concerning claimant's shoulder injury and the shoulder examination.

From July 12, 2009, until August 31, 2010, claimant sought no treatment for his neck or back symptoms. Claimant indicates he told Ben Kennedy, Dr. Neel, the physical therapist and Dr. Mann about complaints or injuries to his neck and/or back. Mr. Kennedy and Ms. Carlson testified claimant did not tell them he had a neck or back injury and Mr. Davis indicated that when he spoke with claimant on September 1, 2010, claimant did not report neck complaints. None of the medical reports, with the possible exception of the Neel/Hendrix report, make any mention of claimant having a neck or back injury.

Also convincing is the medical evaluation report of Dr. Hanson. Dr. Hanson observed that claimant was born in 1933 and that his cervical and lumbar spine symptoms were consistent with osteoarthritis and spondylosis secondary to degeneration of the cervical spine and lumbar spine for someone his age. In essence, he opines that

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[16] *Box v. Cessna Aircraft Company*, 236 Kan. 237, 689 P.2d 871 (1984).

[17] P.H. Trans., Resp. Ex. 7.

[18] *Id.*, Cl. Ex. 3.

claimant's neck and lower back symptoms were not caused or aggravated by the July 12, 2009, incident.

In 2008, claimant received treatment for his back from Dr. Pick over a period of several months. Because of back symptoms, claimant underwent an MRI at the direction of Dr. Fitzgerald. From June 20, 2008, when Dr. Fitzgerald read the MRI report, until August 31, 2010, claimant was not treated for neck or lower back symptoms. On August 31, 2010, claimant complained of rib and back pain, one week in duration, but no treatment for claimant's back was provided. Dr. Neel's records do not indicate claimant asked Dr. Neel to refer claimant to another physician for his neck and/or lower back problems.

Dr. Murati examined claimant almost 14 months after the incident on July 12, 2009. In his report, Dr. Murati never indicated he reviewed the chiropractic records of Dr. Pick, or the medical records of Dr. Mann, Dr. Fitzgerald and the Community Clinic of Beaver. Dr. Murati opines that within a reasonable degree of medical probability, claimant's neck and back pain is a direct result of the work-related accident on July 12, 2009. However, Dr. Murati diagnosed claimant with low back pain and neck pain, but does not specify the cause of the pain. Unlike Dr. Hanson, Dr. Murati does not indicate claimant has osteoarthritis, spondylosis or some other medical condition that is causing claimant's neck and back pain.

Simply put, claimant has failed to prove by a preponderance of the evidence that on July 12, 2009, he met with personal injury by accident arising out of and in course of his employment with regard to his neck and low back.

Whether claimant gave respondent timely notice of the accident

The ALJ ordered medical treatment for claimant's low back and cervical area. Because this Board Member found claimant's neck and back injuries did not arise out of and in the course of his employment, the issue of whether claimant provided timely notice of the accident is moot.

By statute the above preliminary hearing findings are neither final nor binding as they may be modified upon a full hearing of the claim.[19] Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.[20]

[19] K.S.A. 44-534a.

[20] K.S.A. 2010 Supp. 44-555c(k).

WHEREFORE, the undersigned Board Member reverses the March 14, 2011, Order For Medical Treatment entered by ALJ Fuller. The undersigned Board Member reverses the ALJ's implied finding that the claimant suffered neck and low back injuries by accident that arose out of and in the course of his employment. This finding renders moot the issue of timely notice.

IT IS SO ORDERED.

Dated this ____ day of June, 2011.

THOMAS D. ARNHOLD
BOARD MEMBER

c: Terry J. Malone, Attorney for Claimant
Kevin J. Kruse, Attorney for Respondent and its Insurance Carrier
Pamela J. Fuller, Administrative Law Judge